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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 831

WILLIAM H. TEGTMEYER, ET AL.,
Respondents,

vs.

DAISY C. TEGTMEYER,
Petitioner.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

The respondents, Minnie Tegtmeyer, Administratrix of the Estate of William H. Tegtmeyer, deceased, Louis J. Boock and Philip F. Abboud, Executors of the Last Will and Testament of Anna L. Boock, deceased, William White, Wesley White, George White, Robert White, Louise A. Taubert and Albert Nave Wilson, respectfully ask that the petition of Daisy C. Tegtmeyer for writ of certiorari to review the orders of the Appellate Court of Illinois, First District, be denied for the following reasons:

I.

NO FEDERAL QUESTION HAS BEEN SAVED.

(A) It must appear from the record that a Federal question was presented for decision.

Honeyman v. *Hanan*, 300 U. S. 14; (81 L. ed. 476).

Thompson v. *Dean*, 74 U. S. (7 Wall.) 342 (19 L. ed. 94).

Stovall v. *Banks*, 77 U. S. (10 Wall.) 583 (19 L. ed. 1036).

DeGrasse v. *Gossard Co.*, 236 Ill. 73.

Gray v. *Ames*, 220 Ill. 251.

Bennett v. *Webber*, 323 Ill. 283.

(B) It must appear from the record that decision of the Federal question was necessary to a determination of the cause.

Honeyman v. *Hanan*, 300 U. S. 14; (81 L. ed. 476).

(C) Petitioner by her appeal to the Appellate Court of Illinois waived any question as to a violation of her constitutional rights.

People v. *Rosenthal*, 370 Ill. 244.

People v. *Terrill*, 362 Ill. 61.

People v. *Lawson*, 351 Ill. 507.

L. & N. R. R. v. *Woodford*, 234 U. S. 46 (58 L. Ed. 1202).

II.

NO SUBSTANTIAL FEDERAL QUESTION HAS EVER BEEN RAISED IN THIS CAUSE.

(A) The Eighth Amendment to the Constitution of the United States applies only to the National Government and does not apply to the State Government.

Ex Parte Spies, 123 U. S. 131 (31 L. ed. 80).

Collins v. *Johnston*, 237 U. S. 502 (59 L. Ed. 1071).

(B) Imprisonment for civil contempt until the contemnor complies with the order of court does not violate the provisions of the Fourteenth Amendment to the Constitution of the United States.

Tinsley v. *Anderson*, 171 U. S. 101 (43 L. ed. 91).

ARGUMENT.

I.

NO FEDERAL QUESTION HAS BEEN SAVED.

(A) It must appear from the record that a Federal question was presented for decision.

The petition does not anywhere indicate when and how a Federal question was saved except by reference to the opinion of the Appellate Court of Illinois, in 306 Ill. App. 169 and in 292 Ill. App. 434.

The only reference we find in the opinion in 306 Ill. App. is to the effect that the defendant (Daisy C. Tegtmeyer, petitioner herein) contends that the decree of March 18, 1930, and consequently the *ne exeat* and contempt orders ancillary to it, are void because the courts of Illinois have never had jurisdiction of the subject matter of the proceeding. Some reference is there made to the powers of the Circuit Court of Illinois under the Illinois Constitution but no reference is made to the Federal Constitution. The opinion of the Appellate Court of Illinois, in 292 Ill. App. 434, states that the defendant contends that the court erred in not quashing the "contempt mittimus" because the punishment inflicted upon her is cruel and unusual and contrary to the Eighth Amendment of the United States Constitution and to certain sections of the Constitution of Illinois, and "that she has been deprived of her liberty without due process of law, contrary to the Fifth and Fourteenth Amendments to the United States Constitution."

There is no suggestion as to the circumstances constituting a want of due process. The burden is on the partitioner to show in what manner her constitutional rights have been violated. She has not made such showing by merely referring to some section of the Constitution and by implication inviting the court to review the record and find some violation of her constitutional rights. In *Honeyman* v. *Hanan,* 300 U.S. 14 (81 L. ed. 476), at page 18 (479), the court said:

> "Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the Federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the Federal question was necessary to the determination of the cause. *Lynch* v. *New York,* 293 U.S. 52, 54, 79 L. ed. 191, 192, 55 S. Ct. 16, and cases there cited."

If the Federal question were raised in the case decided in *Tegtmeyer* v. *Tegtmeyer,* 292 Ill. App. 434, the decision of the Appellate Court there reported was made and became final in December, 1937. The petition for leave to appeal to the Supreme Court was denied in the early part of 1938. The time for making an application for certiorari to review that decision expired 3 months after the entry of the judgment.

The subject matter of the jurisdiction of the Illinois courts was adjudicated in the decree of March 18, 1930, which was affirmed by the Appellate Court of Illinois in *Tegtmeyer* v. *Tegtmeyer,* 259 Ill. App. 661, and by the Supreme Court of Illinois in *Tegtmeyer* v. *Tegtmeyer,* 348 Ill. 434, which decided in 1932 all questions between the parties except as to the amount the complainants were entitled to recover, which was to be determined by the Master upon a re-reference for the purpose of taking and stating

an account. Since the judgment became final in 1932 the time for making application for certiorari on that decision has long since expired. Petitioner says on page 12 of her brief in support of her petition that certiorari could not have issued to the Supreme Court of Illinois to review the decree of March 18, 1930, affirmed in *Tegtmeyer* v. *Tegtmeyer,* 348 Ill. 434, for the reason that the decree then under review was interlocutory in nature, and cites *Gant* v. *Oklahoma,* 284 U.S. 594. The case cited merely says that the appeal was dismissed for want of jurisdiction without specifying the circumstances indicating the lack of jurisdiction. The decision of the Oklahoma Supreme Court, 150 Okla. 86, 6 P(2d) 1065, indicates that the appeal was from an order granting a temporary injunction. An order granting a temporary injunction is always granted to preserve the *status quo* pending the final determination of a case. Under the Illinois practice, a decree requiring a litigant to account and stating the manner in which the account should be taken is regarded as a final decree. By the decree of March 18, 1930, the court decreed that Daisy C. Tegtmeyer (petitioner herein) was a *trustee de son tort* and certain securities constituted a trust fund, some of which are mentioned in *Tegtmeyer* v. *Tegtmeyer,* 292 Ill. App. 434, at page 437. The only thing remaining to be done was to take the accounting pursuant to the decree of March 18, 1930. If the decree of March 18, 1930, was not final for the purpose of giving this court jurisdiction to review the decree by certiorari, then there was no final decree at the time of the filing of the petition herein, which would give this court jurisdiction to review the proceedings by certiorari.

In *Thompson* v. *Dean,* 74 U.S. (7 Wall.) 342, 19 L. ed. 94, the decree directed the defendant therein to transfer forthwith certain shares of stock to certain plaintiffs therein and directed that an account be taken and stated as to

the amount paid and to be paid for the stock and as to dividends accrued and to be credited under the contracts between the parties. The decree, for the purpose of giving jurisdiction to the Supreme Court, was held to be final. In *Stovall* v. *Banks,* 77 U. S. (10 Wall.) 583, 19 L. ed. 1036, the decree adjudged that certain assets were in the hands of the administrator and ordered distribution thereof and directed the issuance of execution for the respective sums due the several distributees. The decree after fixing the respective amounts due and directing the issuance of execution, went on to direct that the administrator be allowed the principal and interest of any note held by him against any of the several distributees, and directed that the several sums should be subjected to ratable deduction for fees yet unpaid for the collection of notes belonging to the administrator. In deciding that the decree was a final decree notwithstanding the amounts to be later determined, the court said:

> "It is not unusual in courts of equity to enter decrees determining the rights of parties, and the extent of the liability of one part to the other, giving at the same time a right to apply to the court for modifications and directions. It has never been doubted that such decrees are final."

The instant suit was among other things for an accounting. The decree which is the subject matter of the appeal in 348 Ill. 434 required Daisy Tegtmeyer (petitioner herein) to account, specified the manner in which the account should be taken and referred the matter to a Master to take and state the account. The decree was final and appealable under the law of Illinois. Daisy Tegtmeyer appealed from that decree to the Appellate Court (259 Ill. App. 661, decided 1930) and, upon its affirmance there, she appealed to the Supreme Court (348 Ill. 434, decided 1932). The

practice is discussed in *DeGrasse* v. *Gossard Co.*, 236 Ill. 73, where the court, among other things, quotes from *Gray* v. *Ames*, 220 Ill. 251, as follows:

> "'A final decree is one which fully decides and finally disposes of the entire merits of the case. Some other order or decree of the court may be necessary to carry into effect the rights of the parties or some incidental matter may be reserved for consideration, which decision, either one way or another, cannot have the effect of altering the decree by which the rights of the parties have been declared. A decree is final even where, as a mere incident to the relief granted, it directs a reference to a master to state an account. Where accounts are to be settled between the parties and the decree contains an order of reference by which the accounts are to be stated according to certain principles fixed by the decree, such order of reference will not have the effect of rendering the decree interlocutory.'"

To the same effect see *Bennett* v. *Weber*, 323 Ill. 283, at pages 292 and 293.

(B) It must appear from the record that decision of the Federal question was necessary to a determination of the cause.

The language above quoted from *Honeyman* v. *Hanan*, 300 U. S. 14 (81 L. ed. 476), on page 5, clearly shows that the record must not only show affirmatively that the Federal question was presented but must also show that the decision of the Federal question was necessary to a determination of the case. The judgment of the Illinois courts, which petitioner seeks to have reviewed by her petition for certiorari, is the judgment entered in June, 1940, reported in 306 Ill. App. 169. In the decision the court in effect decided that all matters sought to be raised had been

previously decided by that court upon a previous appeal and that the law does not permit reviewing cases by piecemeal. Not only does the record fail to show that any Federal question was presented, but it affirmatively appears that the decision of a Federal question was not necessary for a determination of the cause. The court might well have decided, and did decide, that the court was precluded from reviewing the case because all matters presented had previously been decided.

(C) Petitioner by her appeal to the Appellate Court of Illinois waived any question as to a violation of her constitutional rights.

Under the Illinois practice, cases involving constitutional questions are appealed directly to the Supreme Court of the state and it has been repeatedly held that an appeal to the Appellate Court operates as a waiver of any constitutional question.

In *People* v. *Rosenthal,* 370 Ill. 244, Rosenthal was found guilty of contempt and sentenced to 3 days in the county jail. An appeal was taken to the Appellate Court where the judgment was affirmed and a writ of error was sued out of the Supreme Court. In its decision, the court there said at page 247:

> "The first two contentions present constructions of the constitution. The Civil Practice act (Ill. Rev. Stat. 1937, chap. 110, par. 199) requires that all cases in which constitutional questions are raised must be taken directly to this court for review. If such a case is taken to the Appellate Court and other errors are assigned of which that court has jurisdiction, the plaintiff in error or appellant is held to have waived the constitutional questions. (*People* v. *Terrill,* 362 Ill. 61, and cases there cited.) The constitutional questions urged by plaintiffs in error cannot be considered."

There are numerous decisions to the same effect, including *People* v. *Terrill*, 362 Ill. 61 and *People* v. *Lawson*, 351 Ill. 507.

The federal question must be preserved in accordance with the rules of the state practice. In *Louisville & Nashville R. Co.* v. *Woodford*, 234 U. S. 46 (58 L. ed. 1202) at page 51 (1207), the court said:

> "The decisions of this court not only have repeatedly held that a Federal right, in order to be reviewable here, must be set up and denied in the state court, but have often held that such claim of denial is not properly brought to the attention of this court where it appears that the state court declined to pass upon the question because it was not raised in the trial court, as required by the state practice." (Citing cases.)

II.

NO SUBSTANTIAL FEDERAL QUESTION HAS EVER BEEN RAISED IN THIS CAUSE.

(A) The Eighth Amendment to the Constitution of the United States applies only to the National Government and does not apply to the State Government.

Petitioner's suggestion that she is being deprived of constitutional rights guaranteed to her by the Eighth Amendment to the Constitution of the United States does no present a substantial Federal question because that amendment has no application to the State Government. In *Ex parte*: *Spies*, 123 U. S. 131, 31 L. ed. 80, at page 86, the court said:

> "That the first ten articles of amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the

National Government alone, was decided more than a half century ago, and that decision has been steadily adhered to since."

In *Collins* v. *Johnston,* 237 U. S. 502, at 510 and 511, 59 L. ed. 1071, at 1079, the court said:

"The 8th Amendment is also invoked, with its prohibition of cruel and unusual punishments; but, as has been often pointed out, this is a limitation upon the Federal government, not upon the states." (Citing cases.)

(B) Imprisonment for civil contempt until the contemnor complies with the order of court does not violate the provisions of the Fourteenth Amendment to the Constitution of the United States.

Aside from the omission of Daisy C. Tegtmeyer (petitioner herein) to state in what manner she has been deprived of her liberty or property without due process of law or her rights guaranteed by Article 14 of Amendments to the Constitution of the United States have been violated in any other manner, it will be observed that she was committed to jail for contempt of court. Her imprisonment under those circumstances does not present a substantial Federal question. In *Tinsley* v. *Anderson,* 171 U. S. 101 (43 L. ed. 91), Tinsley was ordered to turn over to the receiver of a corporation certain books and records which he had in his possession as an officer of the corporation. He failed to comply with the order and was committed to jail for contempt and sought his release from imprisonment on the ground that his constitutional rights had been violated.

The court said, at page 107 (97):

"The other objections suggested require no special consideration. It is said that the imprisonment for

contempt was limited by the state statute to three days (art. 1101, Tex. Rev. Stat.), but the state court held that that statute had reference to a quasi-criminal contempt as a punishment, and not to a civil contempt, where the authority of the court is exercised by way of compelling obedience. Rapalje, Contempt, sec. 21. This is not a Federal question, and we accept the ruling of the state court in its construction of the statute. It is urged that the order of commitment imposed an uncertain and indefinite term of imprisonment; but the order was that Tinsley should be confined until he complied, and the addition, 'or * * * until he shall be discharged by the further order of the court,' was merely intended to retain the power to discharge him if the court should thereafter conclude to do so, it being within his own power to obtain his discharge at any time by obeying the order. Nor is there any force in the objection that no trial by jury was awarded, for such trial was not demanded, and a jury trial is not necessary to due process of law on an inquiry for contempt. *Walker* v. *Sauvinet,* 92 U. S. 90 (23:678); *Eilenbecker* v. *Plymouth County District Court,* 134 U. S. 31 (33:801); Rapalje, Contempt, sec. 112."

On page 13 of the petition, in the argument in support of the petition, it is said that the petitioner is brought into the picture as a guarantor for her husband. The record discloses Daisy C. Tegtmeyer had possession and control of the trust funds which for years she has wilfully concealed. The record filed by petitioner herein does not contain the pleadings nor the decree but in her petition reference is made to the decision of the Supreme Court of Illinois in *Tegtmeyer* v. *Tegtmeyer,* 348 Ill. 434. It there appears that petitioner's husband, Edward Tegtmeyer, received $5,000 in accordance with the provisions of an

agreement (see pages 4 and 5 of the petition) and with reference thereto the court says on page 437:

"After the execution of this agreement the estate of Henry was closed and the assets distributed except the $5000 covered by the contract. In August, 1913, before the trust agreement was executed, Edward, without the knowledge or consent of the other heirs, took $5000 from the estate of Henry and invested it, together with $13,000 of his own funds and those of his wife, in vacant real estate in Chicago. Title to the land was taken in the names of Edward and Daisy. Edward died on November 1, 1924, leaving Daisy as his widow and sole heir-at-law.

The original bill was filed on March 11, 1925. It set up the facts substantially as above stated. After the bill was filed, Daisy Tegtmeyer on March 18, 1925, made a contract to sell the real estate in which the trust fund was invested. The Chicago Title and Trust Company refused to issue to the purchasers a title guaranty policy unless $10,000 was deposited with it to protect it against the outcome of this litigation. Daisy deposited the $10,000, and on April 20, 1925, a deed was executed to the purchasers and $46,240.01 was paid as the purchase price. The proceeds of this sale, including the $10,000 deposited with the Chicago Title and Trust Company, were invested by Daisy in stock of the Commonwealth Edison Company, the Middle West Utilities Company and the American Telephone and Telegraph Company. On May 1, 1925, an amended bill was filed. It described the real estate purchased by Edward and Daisy and alleged that it had been purchased in whole or in part with the proceeds of the trust fund in breach of the trust agreement, and that defendants in error were entitled to a conveyance of these premises or an undivided interest

therein. It set up the contract of March 18, 1925, to sell this real estate. On June 18, 1926, an amended and supplemental bill was filed, which alleged that Daisy had appropriated the trust fund, and the proceeds thereof, and had invested them in various properties. The master on May 18, 1929, filed his report, in which he recommended that, pending an accounting, Daisy and the Chicago Title and Trust Company be restrained from disposing of the $10,000 or the securities substituted therefor, and that Daisy be restrained, pending the accounting, from disposing of the stock of the American Telephone and Telegraph Company held by her. On January 10, 1930, the bill was again amended by alleging that Edward and Daisy had admitted that the $5000 trust fund was invested in the real estate and that it was held by them subject to the trust. The decree was entered March 18, 1930, and it directed Daisy to file an account setting out in detail all property in which the $5000 trust fund, or any part thereof, had been invested or intermingled, including all profits from investments."

The petition and record when tested by the rules above referred to show that no Federal question has been saved for review because (1) the record does not show that any Federal question was raised in the proceeding which the Court is now asked to review; (2) if such a Federal question had been raised, it was not decided and not necessary to a decision because the decision was to the effect that all questions raised had been disposed of on a previous appeal; (3) the petitioner by her appeal to the Appellate Court, under the Illinois practice, waived any constitutional question; (4) no substantial Federal question has ever been raised because Article VIII of Amendments to the Constitution of the United States, referred to by the petition, applies only to the Federal Government and does

not apply to the State Government, and (5) imprisonment for contempt to compel obedience to the order of a chancery court does not constitute depriving the contemnor of her liberty without due process of law.

On two previous occasions Daisy C. Tegtmeyer (petitioner herein) sought to have this Court review proceedings heretofore had in the Illinois Courts. An application for leave to file petition for Writ of Habeas Corpus was denied on May 18, 1936. *Original Ex parte Daisy C. Tegtmeyer, Petitioner,* 298 U.S. 642 (80 L. Ed. 1374). A motion for leave to file petition for Writ of Habeas Corpus was also denied by this Court on October 17, 1938. *Original Ex parte Daisy C. Tegtmeyer, Petitioner,* 305 U.S. 565 (83 L. Ed. 356).

Respectfully submitted,

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